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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

GENERAL ABDULSALAMI ABUBAKAR, PETITIONER

v.

CHIEF ANTHONY ENAHORO, DR. ARTHUR
NWANKWO, FEMI ABORISADE, OWENS WIWA,
C.D. DOE, CHIEF GANI FAWEHINMI, and HAFSAT
ABIOLA, individually and on behalf of the estate of her
deceased father CHIEF M.K.O. ABIOLA

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS -
FOR THE SEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United Court of Appeals for the Seventh Circuit erred by holding that the that Petitioner was not immune under the Foreign Sovereign Immunity Act where he was sued for actions taken in the course of his position as a public official?

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OPINIONS BELOW

The decision of the United States Court of Appeals (7th Circuit, Case No. 03-3089, Decided May, 23, 2005) is attached, and reprinted in the Appendix to the Petition for Certiorari. The decision of the United States District Court for the Northern District of Illinois is reported at 267 F. Supp. 2d 907, and reprinted in the Appendix to the Certiorari.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit on May 23, 2005 entered a judgment (Pet. App.1), upholding the decision of the United States District Court for the Northern District of Illinois (Pet. App.2) Petitioner timely sought and obtained an extension of time to file a Writ of Certiorari till October 20, 2005. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1604 of the Foreign Sovereign Immunities Act ("FSIA") (Doc. 45). 28 U.S.C. §1602, *et seq.* provides in its pertinent part:

§ 1604. Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a *foreign state* shall be immune from the jurisdiction of the courts of the

United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1604 (emphasis added). A "foreign state" is defined as:

§ 1603. Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an *agency or instrumentality* of a foreign state as defined in subsection (b).

28 U.S.C. §1603 (emphasis added). Finally, an "agency or instrumentality" is defined as:

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) *which is a separate legal person, corporate or otherwise, and*

(2) *which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and*

(3) *which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.*

28 U.S.C. §1603(b).

STATEMENT OF THE CASE

A. Factual Background

Respondents, Nigerian citizens, brought this case against various Nigerian government officials, alleging they had been wrongfully detained, assaulted, and tortured while in Nigeria from 1993-98. Respondents' amended complaint was only against Petitioner. Starting in 1993, Petitioner was alleged to be a "principal member of the Armed Forces Ruling Council (AFRC) and Provisional Ruling Council (PRC)" under the prior Heads of State of Nigeria. After a series of Nigerian leaders, Petitioner took over leadership of the Republic of Nigeria in 1998.

Respondents alleged that the PRC "was the highest decision making body of the military junta" which was then the controlling body. Petitioner was a member at all times of the PRC which was in control of the government, and "all acts of Government were subject to the ultimate approval of the Provisional Ruling Council". Nigeria was governed by the PRC from 1993 until Petitioner returned the country to a democracy.

Respondents alleged Petitioner was the Chief of the Defense Staff, and a "top ranking member/functionary of the military junta". As the Chief of Defense and a "principal member" of the PRC, Petitioner occupied "the third highest [m]ilitary and [p]olitical position in Nigeria between 1993 and 1998". Around December 1998, Petitioner became second in command to the PRC chairman. Upon the death of the chairman in June 1998, Petitioner became the head of

state and leader of Nigeria. Respondents alleged that Petitioner released political detainees and activists.

Petitioner is sued for injuries "inflicted under color of law and under color of official authority by public officials and other persons acting in an official capacity". Respondents alleged that at all times, Petitioner and unnamed persons "acted within the scope of their respective employments (sic) as officers and members of the military junta". Respondents asserted that Petitioner was responsible for the actions of the PRC, the governing body, from November 1993 through May 1999. He acted as "a member/chairman" of the PRC on behalf of the military government.

One Respondent, Dr. Nwankwo, testified that after Petitioner took over as head of state, he promised he would return the government to civilian control, and Petitioner "kept that promise".

On May 29, 1999, less than a year after taking office around June 1998, Petitioner returned Nigeria to a democracy. Since the return to democracy, confessed murderers and some members of the PRC have been arraigned on the charges of murder of one Respondent's decedent.

**Petitioner Raised the Foreign Sovereign Immunity
Act and The District Court and the Court of
Appeals Ruled It Did Not Apply**

Petitioner moved summary judgment based on, *inter alia*, the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §1602, *et seq.* The District Court denied, in part, the Petitioner's motion for summary judgment. It rejected Petitioner's claim he was immune under the FSIA by its order of June 17, 2003.

It found the "act makes no mention of any immunity afforded to individuals". It held that the FSIA did not provide immunity to Petitioner when he was head-of-state. It concluded that defendant was immune under common law immunity, but only for the year he was head-of-state before Petitioner returned Nigeria to a democracy.

Petitioner moved to reconsider. In support of the motion, he noted that the court had overlooked defendant's assertion that FSIA immunity while he was serving in other positions with the government, including as a high-ranking official and member of the Provisional Ruling Council. He sought reconsideration because "the FSIA provides immunity for individuals of the government sued in their capacity as agents of the government".

The District Court orally denied the motion for the reasons stated in open court. Defendant appealed to the Seventh Circuit. The Court of Appeals concurred with the District Court holding that FSAI immunity does not apply to individuals. The Circuit erroneously departed from the ruling on the same point of law in the case of *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990).

SUMMARY OF THE ARGUMENT

The District Court erred in holding that this Petitioner was not immune under the Foreign Sovereign Immunities Act of 1976. Respondents are Nigerian citizens who sued this Petitioner for official conduct taken while serving in the capacity as a Nigerian public official and as a member of the ruling council. All the challenged conduct occurred in Nigeria.

The District Court erroneously held that the FSIA did not apply to individuals, concluding instead that Petitioner was only immune under common law head-of-state immunity for the year he served as president. When the statute is read in its entirety, it is clear that public officials whose challenged actions were taken in the course of their governmental position are entitled to immunity. The Congressional intent was to remove the determination of foreign sovereign immunity from the State Department and give it to the courts. In enacting the FSIA, Congress codified the "restrictive theory" of foreign sovereign immunity, which provided immunity to individuals and states for public, not private, actions.

The circuits, when confronted with the issue of whether the FSIA applies to individuals in civil actions, have held that it does apply. The District Court erred in relying on state and federal trial court decisions instead of appellate court decisions. District Court decisions are not precedent for stare decisis; they are only binding under preclusion principles in the same case. Regardless, the District Court decisions support the Petitioner's assertion of FSIA immunity here.

Because this issue resolves all claims, this Court should reverse and enter judgment for the Petitioner.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE FSIA.

The issue before this Court is whether the Petitioner, an individual whose alleged conduct was solely in his capacity as a non-head-of-state officer of a foreign state, is afforded immunity under the Foreign